BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LESLIE N. WALKER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,038,041
CENTURY MANUFACTURING, INC.	)	
Respondent	)	
AND	)	
	)	
ST. PAUL TRAVELERS INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the June 10, 2008 preliminary hearing Order of Administrative Law Judge John D. Clark (ALJ). Claimant was awarded medical treatment with Pat D. Do, M.D., as the authorized treating physician after the ALJ determined that claimant had suffered an accidental injury which arose out of and in the course of his employment with respondent and had just cause for not reporting his injury within 10 days of the accident.

Claimant appeared by his attorney, Phillip R. Fields of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, William L. Townsley, III, of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held June 10, 2008, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer an accidental injury which arose out of and in the course of his employment with respondent? Respondent contends claimant's injury resulted from a sneeze and was not caused by his work for respondent. Claimant argues the sneeze was the result of his labors with respondent and, thus, compensable.

2. Did claimant provide notice of his accident? Respondent argues claimant did not notify it of the alleged injury until September 13, 2007, when claimant talked to Tom McKay, respondent's shop foreman. Claimant alleges respondent did not raise this issue to the ALJ at the preliminary hearing and should be precluded from raising the issue at this time. However, at the preliminary hearing, respondent's attorney stated that "there was no notice provided of a specific work-related event".[1] This would appear to be an indication in this record that notice of accident was in dispute.

3. If timely notice was not provided, did claimant have just cause for his failure to timely notify respondent of the alleged accident?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed.

Claimant is an inmate at the El Dorado State Penitentiary serving a sentence for murder. He will become eligible for parole in 2023. As an inmate, he had the opportunity to work for respondent, loading trucks and performing janitorial services in the prison. On August 17, 2007, claimant assisted in the loading of a truck. He then proceeded to a bathroom where he swept the floor, a normal job duty. As he was dumping the dust pan, claimant sneezed, his back popped and he felt an immediate pain in his back. Claimant acknowledged there was nothing unusual about the date of accident. He simply bent over and sneezed.

The next morning, Saturday, claimant was experiencing significant back pain and was unable to get out of bed. He told "the guys" (not otherwise identified) to tell Kevin, one of claimant's supervisors, of his back and his inability to come to work. The next Monday, claimant asked Johnny Goss (claimant's roommate at the time of the alleged injury) to tell Kevin claimant's back hurt and claimant was not able to work. There was no testimony from Mr. Goss, Kevin or "the guys" in this record to verify or dispute claimant's testimony in this regard.

Beginning August 24, 2007, claimant attempted to obtain medical treatment from the prison walk-in clinic. But by September 5, 2007, according to claimant's brief, the clinic refused to treat him due to the injury potentially being due to a work-related injury. However, the clinic records indicate claimant was treated on September 5 and September 13, 2007. After this, claimant spoke to Tom McKay and requested medical

[1] P.H. Trans. at 23.

treatment. Claimant ultimately came under the care of board certified orthopedic surgeon Pat D. Do, M.D. Claimant provided Dr. Do with a history of injury while unloading a truck and sweeping when he sneezed and felt a pop in his back. Dr. Do opined that claimant's injuries were the result of that incident.[2]

At the time of the preliminary hearing, claimant was not working for respondent. Claimant had been caught hoarding medication and was convicted of theft. As a result, he was precluded from working for respondent for a period of one year, until October 8, 2008.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

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[2] P.H. Trans., Cl. Ex. 1.

[3] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2007 Supp. 44-501(a).

> injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

K.S.A. 2007 Supp. 44-508(d) defines "accident" as,

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.[7]

K.S.A. 2007 Supp. 44-508(e) states:

> (e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

In *Hensley*,[8] the Kansas Supreme Court categorized risks associated with work injuries into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character. This analysis is similar to the analysis set forth in 1 *Larson's Worker's Compensation Law*, § 7.04[1][a] (2006). The simplest explanation is that if an employee falls while walking down the sidewalk or across a level factory floor for no discernable reason, the injury would not have happened if the employee had not been engaged upon an employment errand at the time.

Remarkably, this is not the first time the Board has been asked to consider a potential back injury incurred when a worker sneezed at work. In *Seymore*,[9] the Board was asked to consider whether an injury which occurred when a worker sneezed at work arose out of and in the course of his employment. The matter was brought before the Board on

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[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[7] K.S.A. 2007 Supp. 44-508(d).

[8] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

[9] *Seymore v. Midland Steel Company*, No. 248,490, WL 235611 (Kan. WCAB Feb. 17, 2000); *Seymore v. Midland Steel Company*, No. 248,490, WL 1669678 (Kan. WCAB Nov. 30, 2001).

two occasions. The first time, on appeal from a preliminary hearing order of December 9, 1999, a Board Member found that claimant's injury did not arise out of and in the course of his employment. The injury originally described by the claimant in *Seymore* involved a jar to the claimant's back when a heavy metal plate caught an arc. There was no indication of any onset of pain at that time. The claimant's injury was not found to have arisen out of and in the course of his employment. When the matter next appeared before the Board, the claimant's injury history included immediate pain in his lower back at the time he was jarred by the metal plate. The subsequent sneeze aggravated the back pain. It was determined at that time that the injury did arise out of and in the course of his employment, with the sneeze being the cause of a worsening of the back pain, rather than the original cause of the pain.

This matter is factually more consistent with the first *Seymore* decision in that claimant has described no pain associated with the unloading of the truck. The pain originated with the sneeze. Additionally, this record does not support a finding that the sneeze was caused by any work-related element. When claimant was asked if the dust contributed to or caused the sneeze, he discussed the earlier lifting, but failed to identify the dust as a contributing factor. This Board Member finds this injury to be akin to a personal risk and not a neutral risk nor anything related to claimant's work. Sneezing would also appear to be a normal activity of day-to-day living and, thus, not compensable. The determination by the ALJ that claimant suffered an injury which arose out of and in the course of his employment with respondent is reversed. This decision renders moot the issues of notice and just cause.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that his injuries suffered on August 17, 2007, arose out of and in the course of his employment with respondent.

[10] K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated June 10, 2008, should be, and is hereby, reversed and any award for compensation in this matter is denied.

IT IS SO ORDERED.

Dated this ____ day of August, 2008.

HONORABLE GARY M. KORTE

c: Phillip R. Fields, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge